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## NEW SANCTIONS AGAINST THE RUSSIAN FEDERATION

*Illegality of European response to Navalny case*

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*In recent weeks, both sides of Russian-Western ties have witnessed several blows inflicted, bringing relations to a new low. Indeed, new sanctions coupled with a series of diplomatic expulsions over the last few months have, once again, turned the spotlight on the tense relationship between the Russian Federation and the West.*

The Navalny case has been a constantly debated case since 2019 when the Russian political opponent Alexei Navalny was allegedly poisoned in prison and subsequently promptly transferred to a hospital in Germany for treatment. On his return to Russia in January 2021, after his plane diverted, Navalny was arrested at Moscow's Sheremetyevo Airport immediately after his landing. Since then, the Russian anti-corruption campaigner has been lying in prison in hearing after hearing, triggering action by the broader international community, including the European Union.

During the European Foreign Affairs Council meeting held in Brussels on 22<sup>nd</sup> February 2021, High Representative for Foreign Affairs and Security Policy Joseph Borrell presented a list of possible sanctions against the Russian Federation for the conviction of Alexei Navalny and severe human rights violations, which was unanimously approved by the Foreign Ministers of the EU's 27 Member States. It is worth stressing that on 20<sup>th</sup> January 2021, the opponent appealed to the European Court of Human Rights for violation of Articles 3, 5, 6, and 11 of the European Charter of Human Rights (ECHR) concerning **the prohibition of torture, the right to liberty and security, the right to a fair trial, and freedom of assembly and association**. On 16<sup>th</sup> February, under Article 39, the **European Court of Human Rights** notified Moscow the appeal and **demanding Navalny's immediate release**. Given the lack of action by the Russian government, the Council of the European Union in February began to consider imposing restrictive measures.

At the time, Moscow fiercely responded to the EU intimidation, with the Russian Foreign Minister, Sergey Lavrov, declaring that Russia would cut relations with the European Union if it continued to impose economically detrimental sanctions against the country. Indeed, following the annexation of Crimea in 2014, the European Union had already enforced targeting economic-coercive measures against Russian individuals allegedly responsible for the "illegal" annexation of the peninsula and the invasion of the Ukrainian Donec Basin.

On 2<sup>nd</sup> March 2021, the Council of the European Union officially declared the imposition of a travel ban and asset freeze on four Russian individuals in charge for "serious human rights violations, including **arbitrary arrests and detentions**, as well as widespread and systematic **repression of freedom of peaceful assembly and of association, and freedom of opinion and expression** in Russia," endorsing for the first time the *Global Human Rights Sanctions Regime*: a

mechanism that facilitates sanctions against human rights infringements. Additionally, on 22<sup>nd</sup> March, the Council issued further restrictive measures against Russian individuals responsible for the torture and repression of LGBT people and Chechen political opponents.

The Russian Foreign Ministry defined on 30<sup>th</sup> April 2021, the European unilateral restrictive measures as a clear intention to "restrain the development of Russia at all cost and to impose a unilateral concept of a 'rules-based world order,' [...] **undermin[ing the] international law, and [...] challeng[ing] the independence of Russia's foreign and domestic policies** [...] with encouragement from the United States [...]". **Furthermore, it accused the European Union of contravening "the UN Charter and fundamental standards of international law, " being the sanctions intrinsically *illegal*.**

As a result, eight European High Officials were blacklisted and declared *persona non grata*, including the President of the European Parliament, Mr David Sassoli, and Vice President of the European Commission for Values and Transparency, Mrs Vera Jourova.

The significant time gap between the Council's implementation of sanctions and the Russian government's response may be explained by the various occurrences that emerged concurrently with the Navalny case.

On 16<sup>th</sup> March 2021, President Joe Biden, during an exclusive exchange of words with ABC News' George Stephanopoulos, defined the Russian leader as a "killer", accusing Putin of interfering in the 2020 American presidential elections and promising measures in response.

President Biden's strong statements were prompted by an unclassified report released by the US Intelligence Community Assessment (ICA) on 15<sup>th</sup> March 2021, aimed at assessing "Foreign actors' intentions and efforts to influence or interfere with the 2020 US federal elections or to undermine public confidence in the US election process."

Following a 2020 investigation, the IC concluded that several foreign actors, including the Russian Federation, influenced the 2020 US elections. Indeed, as the Intelligence Community reported: **"President Putin and the Russian state authorised and conducted influence operations against the 2020 US presidential election aimed at denigrating President Biden and the Democratic Party, supporting former President Trump, undermining public confidence in the electoral process, and exacerbating sociopolitical divisions in the US."**

Less than a month after the interview, President Biden, during a speech on 15<sup>th</sup> April 2021, announced the signing of Executive Order 14024 in order "to authorise new measures, including sanctions, to address specific harmful actions to US interests."

Biden's administration "cannot allow a foreign power to interfere in [its] democratic process with impunity," stated the White House, which extended the existing restrictive measures against the Russian Federation enacted by the Obama administration in 2014. To be specific, the Executive Order provides for economic sanctions and diplomatic expulsions on 46 individuals and entities allegedly involved in Russia's 2014 annexation of Crimea, cyber activities, corruption, human rights violations, and breaches of international law, as well as interfering in free and fair democratic foreign elections. In light of the infringements perpetrated, the steps undertaken were deemed as "proportionate", inasmuch as the American leader does not seek confrontation with Russia but rather a stable relationship based on dialogue and cooperation. Yet, the White House "could have gone further".

Apparently, President Biden's undertaken manoeuvre gave incentive, or perhaps courage, to several European countries to act, resulting in an explosion of diplomatic measures against the Russian Federation. In mid-April, the Czech Republic's government publicly accused the Russian intelligence of its complicity in the two 2014 explosions at an ammunition depot in the south of the country, which resulted in two casualties. The direct effect was the expulsion of 18 Russian diplomats.

Russian Foreign Ministry respectfully denied any involvement and Vladimir Putin agreed to expel 20 Czech embassy employees in turn. European solidarity grew, and a diplomatic back-and-forth between Russia and European countries (including Bulgaria, Slovakia, Romania, Poland, Italy, Germany, and three Baltic countries - Lithuania, Latvia, and Estonia) emerged.

Whilst it may appear to be a minor quarrel, its significance is evident in the Russian government's attempt to draft a list of "unfriendly countries" that will prohibit the latter from "hiring any physical persons, whether Russian or foreign", Russian Foreign Minister stated at a news conference on Wednesday, 28<sup>th</sup> April 2021. However, the list, as well as the countries that will undoubtedly join it, are not yet drafted; information that was further confirmed by Foreign Ministry Spokeswoman Maria Zakharova on 29<sup>th</sup> April.

Additionally, the recent tensions over the deployment of a consistent number of Russian military forces on Ukraine's eastern border for military drills, spreading concern within the international community of a possible new invasion, should be taken into consideration.

The Russian Federation, therefore, seems to be under attack on several fronts.

As previously mentioned, the Russian government, on 30<sup>th</sup> April, accused the European Union's acting in contravention of the UN Charter and, more specifically, *erga omnes* principles enshrined in Article 2: **sovereignty respect**, the refraining from posing threats to **territorial integrity** and the **State's independence**, the non-interference in other **State's internal affairs**, and **sovereign equality**. Moreover, it accused the EU of imposing illegal unilateral sanctions, which undermines the last principle mentioned. This is the crux of the issue: *sanctions*, a highly discussed and controversial topic in the international arena.

*Essential to note is that the sanctions referred to are unilateral sanctions of "economic coercion" and not "military coercion" since for the latter, a centralised system exists in which the UN Security Council is the only international body responsible for maintaining peace and international security and authorising the use of force as an instrument of action.*

*In addition, the term "sanction" is generally used to indicate decisions taken by the UN Security Council, while when measures are enacted unilaterally by States without the UN authorisation, it is preferable to refer to them as "coercive economic measures".*

After this brief premise, since the introduction of the 1945 UN Charter, the prohibition of the use of force as an autonomous means of dispute settlement, and thus the end of the self-help system, a new form of unilateral measure among States started to emerge in 1978 within the framework of the US-France Air Service Arbitration case: **countermeasures**. Countermeasures are enshrined in the 2001 UN Draft Article on State Responsibility, Article 49, and defined as a non-forcible measure (without the use of force), which a State can implement against another State responsible for a wrongful act. They can be considered a system of bilateral "*private justice*" as **countermeasures are**

the result of a State's breach of international law, for which the injured State can conduct a temporary non-performance of another obligation of international law. However, according to Article 49 countermeasures are intrinsically unlawful; yet, justified.

But, what if the violation of international law does not affect just a single State but the entire international community? Can third parties intervene?

In this context, **third parties** not directly involved in a violation of international law **may only intervene in cases of breaches of *jus cogens* and obligations *erga omnes parties*** (i.e., human rights)

Besides, by attentively analysing Article 48, paragraph 2 states that:

"a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and

(b) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached."

Hence, there is no mention of the possibility by third parties to implement countermeasures. Article 48, moreover, should be read in conjunction with Article 54 that states:

"This chapter does not prejudice the right of any State, entitled under the article 48, paragraph 1, to invoke the responsibility of another State, **to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State** or of the beneficiaries of the obligation breached."

As clearly stated in Article 54, thereby, third parties, in case of violation of international law may intervene, but they can only impose **lawful measures** against the perpetrator. However, as previously said, countermeasures are intrinsically unlawful. Thus, third parties, according to international law, could not adopt any unilateral coercive measure apart from encouraging the interested State of stopping the international law infringement and provide for reparation.

The Russian government could further argue that, differently from the United States and the United Kingdom, the European Union does not enjoy extraterritorial jurisdiction, which permits a State to act even beyond national borders in case of an international law violation. **But**, even if it does, in order to act, the breach should have been committed in the European territory or to/by a European citizen because a genuine link is needed.

Furthermore, in this regard, there is a common consensus among countries of the international system, including the European Union, to avoid operating extraterritorially. Indeed, on 4<sup>th</sup> May 2018, the Council of the European Union stated in paragraph 52 of *Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy* that:

"**The EU will refrain from adopting legislative instruments applicable extraterritorially in violation of international law.** The EU has condemned the extraterritorial application of legislative acts of third countries imposing restrictive measures with the intention of regulating the activity of natural or legal persons under the jurisdiction of EU Member States, as they violate international law."

Hence, theoretically, both in the 2014 Crimean case and in the current Navalny case, the European Union could not have imposed unilateral coercive sanctions against the Russian Federation. However, as the jurisdiction on this matter is unclear, state practice is different as States continue to act in countermeasure.

Nonetheless, the European Union decided to act extraterritorially and unilaterally impose sanctions to the Russian Federation because a specific international law violation occurred: human rights. In this case, even though state practice is controversial and the jurisdiction not so straightforward, a third party not directly involved in a severe human rights violation may react. How? Through countermeasures because human rights are *erga omnes*, and each entity within the international system must respect them.

Additionally, addressing specifically the European Union and human rights protection, on 7<sup>th</sup> December 2020, the *Global Human Rights Sanctions Regime* has been established. It is a new Sanctions Regime that imposes targeted economic-coercive measures against both state and non-state actors, as well as the whole State as a political entity, responsible for "providing support to or otherwise involved in serious human rights violations or abuses (such as **torture**, slavery, extrajudicial killing, **arbitrary arrest or detention**)." Besides, the most significant detail of this new Sanctions Regime is that it is applicable to all severe human rights violations regardless of the country in which the breach has been committed, or the nationality of the actors involved. Hence, the European Union, from 2020, can operate beyond the European borders (extraterritorial jurisdiction) without the need for a genuine link in case of human rights infringements.

Notwithstanding this, the Russian Federation is not the only country within the UN framework to oppose unilateral actions because of their negative impact. In reality, such opposition is not new as it started to emerge with the increasing number of extraterritorial, unilateral actions with the new millennium. Indeed, already in September 2014, the UN Human Rights Council adopted a Resolution 27/21 on Human Rights and Unilateral Coercive Measures, stressing the sanctions contravening to international law, the UN Charter, and international humanitarian law, and the negative effect on the society of the targeted States on the long run. Moreover, in March 2020, at the dawn of the pandemic crisis that we are still experiencing today, a group of UN countries affected by illegal sanctions has voted within the UN General Assembly the establishment of a Special Rapporteur on the Negative Impact of the Unilateral Coercive Measures on the Enjoyment of Human Rights. The Special Rapporteur, Ms Alena, Douhan was appointed by the UN Human Rights Council, and in December 2020, she released a series of guidelines to limit the effects of the sanctions on the targeted States, already in difficulty due to Covid19.

Undoubtedly, such UN actions are beneficial; but there is still a high probability that state practice will continue to rely on unilateral coercive measures.



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